



## Cross-border Impact Assessment 2018

Summary



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The *Institute for Transnational and Euregional cross-border cooperation and Mobility / ITEM* is the pivot of scientific research, counselling, knowledge exchange, and training activities with regards to cross-border cooperation and mobility.

ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise on Demographic Changes (NEIMED), Zuyd University of Applied Sciences, the City of Maastricht, the Euregio Meuse-Rhine (EMR), and the Dutch Province of Limburg.

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# 1. Introduction

The Institute for Transnational and Euregional cross border cooperation and Mobility / makes a scientific contribution to cross-border mobility and cooperation. One of its core activities is to analyse border effects in its annual Cross-border Impact Assessments. Since its foundation in 2015, ITEM has conducted three such impact assessments. The present report is the latest edition of the Cross-border Impact Assessment.<sup>1</sup>

Through its Cross-border Impact Assessment, ITEM offers additional insight into European and national legislative and policy initiatives. ITEM's impact assessment intends to provide a valuable resource for policy makers at the regional, national and European level when they make decisions concerning border regions. In particular, these annual impact assessments support the identification of existing or future border effects and thereby contribute to the political debate. Moreover, the results of the individual dossier research also allow timely adjustments to be made to legislative proposals during their adoption phase.

The ITEM Cross-border Impact Assessment serves a dual purpose, namely to recognise potential negative or positive effects of planned legislative or policy initiatives *ex ante* and to identify negative or positive cross-border effects of existing policy or legislation (*ex post*). By fulfilling this purpose, the report can contribute to a better *ex ante* and *ex post* evaluation of legislation and policy for the Member States and regional legislators. Furthermore, the method employed in these impact assessments may be of added value to the European Commission's *ex ante* impact assessment and the evaluation of existing legislation. In this context, the European Commission's Directorate-General for Regional and Urban Policy (DG Regio) considered the Cross-border Impact Assessments carried out by ITEM a good practice in its Communication 'Boosting growth and cohesion in EU border regions'.<sup>2</sup> In that same Communication, the Commission stressed the importance of the identification of cross-border impacts in legislative and policy processes and made it an explicit action point.<sup>3</sup> Awareness of the relevance of cross-border impact assessments is also growing at the national level. For example, the Dutch Secretary of State Knops recently recognised the importance of assessments related to potential cross-border effects during a debate of the House of Representatives.<sup>4</sup>

Various instruments aimed at the assessment of cross-border effects exist at the European and national levels. Examples of such initiatives include the European Commission's Regulatory Impact Assessment, the ESPON Territorial Impact Assessment, and the Impact Assessment Toolkit for cross-border cooperation of the Euroinstitut and the Centre for Cross Border Studies. Each of these initiatives has a different focus and objective. ITEM's Cross-border Impact Assessment is complementary to such existing evaluations. This complementarity of ITEM's report mainly consists of its particular focus on a designated border region.

Conducting in-depth and border-specific impact assessments may be difficult at the European and even at the national level due to the great differences that exist among European border regions. A 2016 study commissioned by the European Commission highlights the needs of border regions according to their particular features and shows the extent to which border regions differ from one another.<sup>5</sup> Therefore, the existing differences in border regions complicate the exercise of European level cross-border impact assessments. At the same time, suggesting that in-depth and border specific impact assessments be carried out at the national level by line ministries may also be a difficult proposition, as the diversity of border regions may also be large at the national level. Germany, for example, has nine neighbouring countries comprising numerous cross-border territories.

- 1 All ITEM Cross-border Impact Assessments may be consulted via the following link:  
<https://www.maastrichtuniversity.nl/research/institutes/item/research/item-cross-border-impact-assessment>.
- 2 Communication from the Commission to the Council and the European Parliament – Boosting growth and cohesion in EU border regions, COM(2017) 534 final, p. 8.
- 3 Ibid.
- 4 *Kamerstukken II 2017/18, 32851, 47, p. 18-21.*
- 5 SWECO et al., Collecting solid evidence to assess the needs to be addressed by Interreg cross-border programmes (2015CE16oATo44) Final Report 2016, European Commission.

Despite these challenges, plenty of action is undertaken at the European and the national levels to tackle them. For example, ITEM experts are currently involved in DG Regio and ESPON projects, which aim at improving the methodologies for EU level Territorial Impact Assessments focused on cross-border territories. When looking at the national level in the Netherlands, the Dutch government is currently discussing how to improve its own policy assessments with regard to border effects with ITEM.

The idea is that cross-border effects should ideally be assessed at all levels: European, national and regional. Considering the large number of border regions and the diversity of their characteristics, there is only so much European and national level impact assessments can map. This gives rise to the need for supplementary small-scale and bottom-up cross-border impact assessments conducted by actors in specific border regions. These in-depth border specific impact assessments could, in turn, contribute to national and European evaluations identifying the cross-border impact of legislation and policy.

ITEM's annual Cross-border Impact Assessment therefore seeks to cater to the existing need for in-depth and border specific impact assessments by evaluating cross-border effects for a wide variety of topics. The present document contains a summary of the results of the 2018 ITEM Cross-border Impact Assessment. This year's impact assessment consists of six dossiers covering very different topics and researching both existing as well as prospective legislation and policy. Topics ranged from the *ex ante* assessment of the proposed German *Baukindergeld* and the evaluation of the proposed Dutch pilot project on legal cannabis cultivation to the *ex post* assessment of the social security position of the non-standard worker and the analysis of different existing national regulations on retirement age.

## 2. Creating the ITEM Cross-border Impact Assessment: Process and Method

### 2.1 The Impact Assessment Process

Despite the differences in topic, researchers of the Cross-border Impact Assessment each apply the methodology developed by ITEM. The research for the impact assessment comprises three stages. In the first stage, the topics to be included in that year's impact assessment are identified by means of a survey which allows stakeholders and other interested parties to inform ITEM about legislation and policy having potential cross-border effects. Apart from this survey, topics are also identified following ITEM's core activities, among others, when conducting scientific research, undertaking counselling activities, knowledge exchange and trainings. During the second stage, the ITEM Cross-border Impact Assessment Working Group assesses the suggested topics. During this assessment phase, the working group (consisting of representatives of partner organisations) focuses on the topicality of the issue, the relationship to ITEM's research focus, the number of requests submitted and the frequency of the issue. Once the topics have been identified, the third step may commence meaning researchers initiate their research. This research is documented in separate dossiers which together form the ITEM Cross-border Impact Assessment of that year.

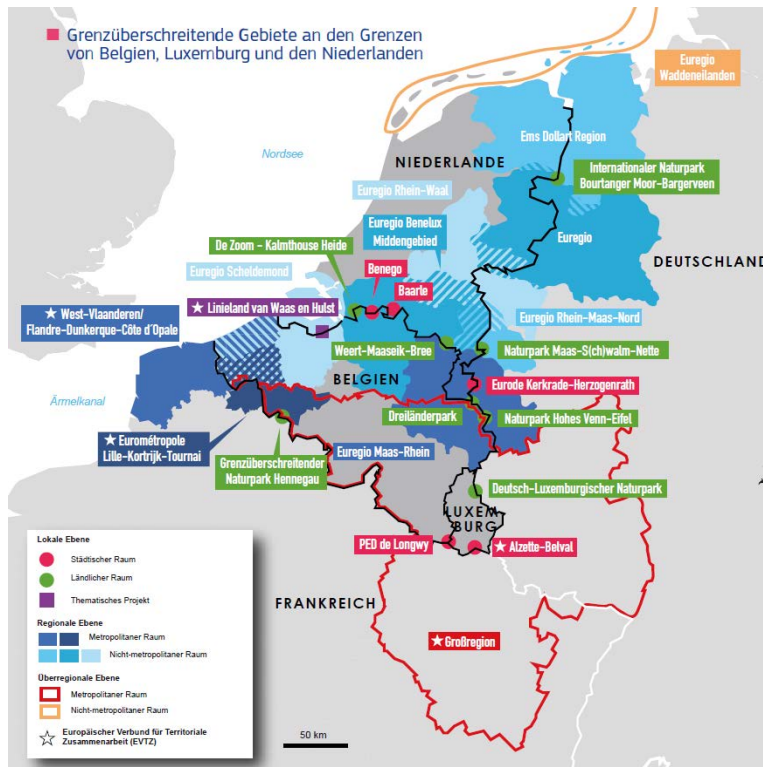
### 2.2 Applying the Method

#### Demarcating the Research – What is a Border Region?

Researchers taking part in the Cross-border Impact Assessment follow the same methodology developed by ITEM, which begins with the definition of the border region. As mentioned above, ITEM aims to fill the existing gap calling for more border specific impact assessments. The borders forming the topic of analysis of the ITEM Cross-border Impact Assessment are the cross-border areas surrounding the borders of the Netherlands, Belgium and Germany. This concerns a broad definition relating to the whole of the impact assessment. Different topics may call for a different definition of the border. Therefore, this definition will be refined further in the individual dossiers of this report, as appropriate to the subject. The idea underlying this dossier-based definition of the border is that general observation reveals few if any generic causes of the cross-border effects. These issues are rooted in

the national implementation of European law, the level of coordination between the neighbouring countries and the way in which certain national legislation or policy is shaped.

Furthermore, it is important to stress that ITEM strives to maintain a truly cross-border perspective in relation to the border region (as opposed to a national one). The choice for such a perspective is a deliberate one, as it avoids the focus being placed on the national perspective. Doing so may result in a bias favouring one nation's perspective on a certain matter as opposed to representing a genuinely cross-border perspective. In order to represent this perspective as much as possible the starting point for the ITEM Cross-border Impact Assessment is not only the border region of the Netherlands, Belgium and Germany, but especially the cross-border Euregions located within that area.



Following this cross-border dossier-based definition of the border region, we may see that this year's Cross-border Impact Assessment indeed focuses on a number of different borders within the Netherlands, Belgium and Germany border region. For example, the student team researching the Dutch pilot project on the legal cannabis cultivation looked at the Meuse Rhine Euregio as well as the Rhine-Meuse-North Euregio. The dossier on the qualifying foreign taxpayer obligation (90% rule) instead defined the border region as the Dutch NUTS3/COROP areas located directly along the Dutch-Belgian and Dutch-German borders. The dossier on the social security position of the non-standard worker in turn interprets the term 'border region' broadly. The dossier is therefore aimed at any part of the Netherlands with which cross-border employment activities are possible. In the *Baukindergeld* dossier, the focus was placed on political entities located along the German border such as municipalities, *Landkreise* or districts.

Apart from this territorial demarcation of the border region, researchers also apply any other demarcation relevant to their research.

## Identifying the Central Research themes, principles, benchmarks, and indicators

Cross-border effects come in many shapes and forms. The ITEM Cross-border Impact Assessment focuses on three overarching themes for which cross-border effects are analysed:

1. European integration: the cross-border impact of certain legislation and policy from the perspective of individuals, associations, and enterprises correlated with the objectives and principles of European Integration (i.e. freedoms, citizenship, and non-discrimination);
2. Socioeconomic/sustainable development: the cross-border impact of legislation and policy on the development of the economy in the border region;
3. Euregional cohesion: the cross-border impact of legislation and policy on cohesion and cross-border governance structures in border regions (e.g. cooperation with governmental agencies, private citizens, the business sector, etc.).

The first theme concerns the potential impact of legislation on individuals living and working in border regions. Dossiers focused on European integration consider questions such as the extent to which certain legislative or policy measures violate the principles of non-discrimination and free movement. The dossier on the *Baukindergeld* is an example of a dossier focusing on European integration and non-discrimination. Another example is the question of different retirement ages and the consequences for cross-border workers. A third example is the dossier examining the situation of cross-border workers with non-standard contractual situations. These measures refer to the general question of non-discrimination within a cross-border labour market.

Researchers focusing on the socioeconomic/sustainable development of certain measures adopt a different angle. Their research focuses on questions related to the functioning of the cross-border and Euregional economy. This year's assessment of the tax scheme for workers employed in the Netherlands but living outside the country (90% rule) is case in point. Another example in the current impact assessment is the ex ante assessment of the intended increase of the Dutch Low VAT rates. Striking questions relate to the possible consequences of the increase for consumers and companies, whether Dutch stakeholders will be confronted with a potentially unfair competitive situation and what this means for investments and employment. The dossier on the Dutch pilot project on legal cannabis cultivation is another example. In this dossier, researchers evaluated the potential effects of the pilot on socioeconomic and sustainable development by focusing on the impact of the policy on employment and taxation.

Finally, researchers may also ask what cross-border effects a certain measure has for Euregional cohesion, meaning cooperation between institutions, business, contacts, and the mindset of cross-border activities amongst citizens. Such aspects play an important role in the assessment of the relationships between the creation and governance of Euregions and the Euregional mindset of citizens. For example, the team assessing the effects of the pilot project on legal cannabis cultivation assessed the effects of the decriminalisation of the cultivation and sale of cannabis on cohesion in the Euregions Meuse-Rhine and Rhine-Meuse-North. Moreover, the dossier on the social security position of non-standard workers assessed the effects of the existing EU social security regulations on Euregional cohesion.

Dossiers may focus on one of these themes, or all of them, depending on the relevance of the theme for their topic, the scope of their research and the availability of necessary data. The research for the 2018 Cross-border Impact Assessment not only focused on sources stemming from legislation and policy, but also on empirical data gathered by specialised institutions and the researchers themselves. For example, the dossier on the qualifying foreign taxpayer obligation ("90% rule") based their research on data from Statistics Netherlands (CBS).

After selecting the research themes pertaining to their dossier, researchers identify the principles relevant to their dossier. These principles subsequently provide the basis for the development of benchmark criteria and ultimately indicators used to review whether legislation or other rules might facilitate or impede best practices. Table 1 below provides examples for principles, benchmarks and indicators for the three research themes of the ITEM Cross-border Impact Assessment.

Table 1: Examples of principles, benchmarks, and indicators

Research themes	Principles	Benchmark	Indicators
1. European integration	European integration, European citizenship, Non-discrimination	No border controls, open labour market, facilitated recognition of qualifications, adequate coordination of social security facilities, taxes	Number of border controls, cross-border commuting, duration and cost of recognition of diplomas, access to housing market, etc.
2. Socioeconomic /Sustainable development	Regional competitive strength, Sustainable development of border regions	Cross-border initiatives for establishing companies, Euregional labour market strategy, cross-border spatial planning	Euregional: GDP, unemployment, quality of cross-border cluster, environmental impact (emissions), poverty
3. Euregional cohesion	Cross-border cooperation/ Good Governance, Euregional cohesion	Functioning of cross-border services, cooperation with organizations, coordination procedures, associations	The number of cross-border institutions, the quality of cooperation (in comparison to the past), development of Euregional governance structures, quantity and quality of cross-border projects

### 2.3 The Dossiers of the 2018 ITEM Cross-border Impact Assessment

The survey for this year’s impact assessment was conducted between November 2017 and January 2018 and was set out among ITEM stakeholders and other interested parties. ITEM received 12 responses to this questionnaire from various partners. Additionally, a number of topics were proposed in the context of ITEM’s day-to-day activities and two topics were identified following a quick scan conducted by ITEM. After the dossiers and subjects submitted were screened, six dossiers were ultimately selected by the Cross-border Impact Assessment Working Group. The final dossiers are the result of a fruitful cooperation of ITEM, its researchers and its partners. As was the case for the 2016 and 2017 impact assessments, the research in some dossiers was rendered possible by the efforts of several students. Table 2 below provides an overview of the topics and research of the ITEM Cross-border Impact Assessment 2018 dossiers.



Table 2: Themes of the ITEM Cross-border Impact Assessment 2018

No.	Subject	Specification
<b>Dossiers</b>		
1.	Exploration of the cross-border impact of an increase in the low VAT rate in the Netherlands	The dossier explores the potential cross-border effects of the increase of the low VAT in the Netherlands. The research focused on providing an <i>ex ante</i> estimation of the economic consequences of the increase.
2.	The qualifying foreign taxpayer obligation (“90% rule”): A preliminary <i>ex-post</i> impact assessment	Researchers aimed at examining trends over the 2013-2016 period to see if notable changes occurred in the number and composition of non-resident employees in the Netherlands after the 90%-rule came into force.
3.	Schemes relating to retirement ages in NL/BE/DE: a multidisciplinary analysis	The dossier consists of an analysis of the border effects of different national regulations on retirement age. The analysis is multidisciplinary in that it includes several perspectives (taxation, social security and pensions).
4.	<i>Baukindergeld</i>	<i>Ex ante</i> research on the proposed German <i>Baukindergeld</i> . The dossier examines the cross-border effects of the measure in-depth and explores possible solutions to improve the legal regime for frontier workers.
5.	Social security of non-standard workers: a challenge at the national and European level	The dossier assesses the position of the non-standard worker by analysing existing legislation on social security ( <i>ex post</i> ).
<b>Student dossier</b>		
6.	The potential effects of the ‘Experiment gesloten cannabisketen’ on the Euregions Meuse-Rhine and Rhine-Meuse-North	The dossier comprises an <i>ex ante</i> assessment of the cross-border effects connected to the proposed Dutch pilot project on legal cannabis cultivation.

## 3. Dossiers

### 3.1 Exploration of the cross-border impact of an increase in the low VAT rate in the Netherlands

*Prof. dr. Frank Cörvers  
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The coalition agreement of the Rutte-III government sets out the intention to raise the low VAT rate from 6% to 9% with effect from 1 January 2019. The rate increase relates to sales of products including fruit, vegetables, and many other foodstuffs, medicines, books, and repair services for clothing, footwear, and bicycles. Such a VAT increase would make the low VAT rate in the Netherlands higher than the lowest VAT rate in Belgium (6%) and the low rate in Germany (7%). In this dossier, we explore the potential cross-border impact of this proposed VAT increase. Our main focus is on an ex ante assessment of the economic consequences, and the consequences for the EU's integration of regulations and Euregional cohesion are also discussed though to a lesser extent.

At the insistence of the European Parliament and the European Council, the European Commission is currently developing plans to switch to a system of taxation in the country of purchase instead of the country of sale. This change of direction will make it possible to liberalize the existing rules on VAT harmonization and will give national governments more scope to set their own rates in the future. It is therefore to be expected that decisions on VAT rates will increasingly be considered national issues. This may result in greater VAT rate differences between countries, whereby, as promised by the current Dutch context, little account is taken of the cross-border impact.

In order to estimate the cross-border impact of the planned increase in the low VAT rate, the scientific literature on cross-border impacts and the consequences of previous changes in indirect taxation in the Netherlands were first examined. The focus then shifts to the specific case in hand, the situation in the Dutch border regions. For example, we discuss some key data on the number of inhabitants and entrepreneurs in the Dutch border region and their contributions to VAT revenues. We also discuss the current price differences, both between the Netherlands and its neighbouring countries and the differences within the Netherlands between border regions and non-border regions. We use secondary data sources supplemented with our own analyses. On the basis of purchase behaviour studies and additional information from a discount chain, we look at the extent to which residents in the Dutch border region are currently prepared to do their shopping abroad, partly because of price advantages. On the basis of this information, we will then make an ex ante assessment of the specific consequences of the VAT increase on the economic situation in the border region, including the competitiveness of businesses, price levels, tax revenues, and cross-border purchase behaviour.

The literature review shows that the question of how entrepreneurs and consumers respond to an increase in indirect taxes cannot be answered unambiguously, especially in the case of border regions. The question is: to what extent the VAT increase will lead to higher prices for consumers and consequently to reduced sales and turnover for businesses? The Netherlands Bureau for Economic Policy Analysis (CPB) assumes that three quarters of the tax increase for the Netherlands as a whole will be paid by consumers and one quarter by companies. If the increase in the low VAT rate is passed on in full to consumers, it will lead to price increases of almost 3%. However, studies of previous rate changes show that such a price increase is very uncertain and highly dependent on the type of product or service concerned. In some cases there may be hardly any price increase for consumers, while in other cases there may be a price increase greater than that justified by the increase in VAT.

The impact of the forthcoming VAT increase on border regions is particularly uncertain. The literature studied shows that price increases in border regions could be both greater and smaller than national price increases. On the one hand, existing literature suggests that price increases at the border will be smaller than in central regions because competition on the other side of the border does not have to pass on any VAT increase to the consumer. On the other hand, competitors in the border regions of Belgium and Germany currently apply higher prices to a number of products and services, which may give the Dutch border regions more scope to raise prices. In other words, there are extra major uncertainties for consumers and businesses in the border regions compared to the rest of the country due to the VAT increase. This relates not only to the prices that consumers will have to pay, but also to the impact on the turnover and profits of businesses, the incomes of entrepreneurs, and employment and economic growth in the border regions.

The scale of the cross-border impact depends on the differences in prices between regions on either side of the border and on the willingness to travel greater distances to make purchases. It appears that the willingness to make purchases further afield in another country is greatly dependent on the context. Factors that play a role in this include the geographical conditions at the border in question, the perception of price differences by consumers, and the degree of substitutability between goods abroad and Dutch goods, which is more pronounced in the case of identical goods that have a long shelf life and are easy to transport. As consumers like to buy goods from a single location, a change in indirect taxation may also affect goods not affected by this rate but sold in the same shops or locations. All this may mean that traders in the border region have more scope in some cases or less scope in other cases to pass on an increase in indirect taxes to consumers.

For 13% of the Dutch population, the border is a stone's throw away, within 10 km, while almost a third of the Dutch population lives within 30 km of a national border. Despite the lack of precise data, we estimate that the planned increase in VAT will increase tax revenue from the low VAT rate by more than €800 million to €2.4 billion in the wider border region, of which almost €1 billion will be generated in the region up to 10 km from the border. Because of the large number of people living in border regions in a general sense, even a relatively small deterioration in competitiveness and a small shift in spending could lead to the loss of many millions of euros in turnover for entrepreneurs and in tax revenues for the Dutch state. There are extra major uncertainties for consumers and businesses in the border regions compared to the rest of the country due to the VAT increase.

In the case of foodstuffs, which account for a large proportion of the revenue under the low VAT rate, price differences between the Netherlands and other countries appear to vary considerably between products. On average, however, the price level for food is considerably lower in the Netherlands than in Belgium (more than 10% cheaper). The price difference with Germany is smaller, but again the Netherlands seems on average to be cheaper (approx. 5%). It is possible that prices in the border region are somewhat higher than in the rest of the Netherlands due to relatively little competition from abroad. For example, the Jumbo supermarket chain charges relatively high prices in branches close to the border and lower prices in municipalities far away from the border.

Purchase behaviour studies show that price differences in the border region are large enough to trigger cross-border purchase behaviour. For instance, a quarter of Dutch households spend an average of €50 euros a month on grocery shopping abroad, which amounts to a total of €1 billion a year. Conversely, Belgians and Germans spend even more in the Netherlands. In Limburg, the region with by far the most cross-border purchasing, people from outside the Netherlands spend much more in the Netherlands (€473 million) than Limburg citizens spend abroad (€228 million). Additional information from one of the discount supermarkets shows that it is primarily Germans (and to a lesser extent Belgians) making cross-border purchases in Limburg, possibly because of certain store preferences and geographical circumstances.

If any cross-border impact is seen anywhere, it is clear that Limburg – especially on the border with Germany – will be the most affected because the most cross-border purchases take place here due to the geographical circumstances. The cross-border impact is usually much greater right at the border than further away. Very locally along the border, especially along the border with Germany, there may be small and medium-sized enterprises (e.g. supermarkets, drugstores, bakers, butchers, and greengrocers) that are greatly affected by the VAT increase due to a loss of turnover in response to price increases, and a loss of profit or income if they do not raise prices. Moreover, Dutch and European VAT policy means it is likely that national VAT rates will diverge further in the future, and the resulting cross-border impact will increase. For entrepreneurs and citizens in European border regions, this means that the national border remains a relevant dividing line, especially for everyday activities such as shopping.

### 3.2 The Qualifying Foreign Taxpayer Obligation (“90% rule”): A Preliminary Ex-Post Impact Assessment

*Prof. dr. Maarten Vink  
Johan van der Valk  
Sem Duijndam*

The qualifying foreign taxpayer obligation (hereafter: QFTO), which entered into force on 1 January 2015, establishes that non-resident taxpayers in the Netherlands may benefit from the same deductions and tax credits as resident taxpayers only if they earn at least 90 per cent of their global income in the Netherlands. Under this new system, these non-resident workers, if they neither earn 90% of their world income in the Netherlands, nor have a sufficient taxable income in their country of residence, risk forfeiting tax benefits (e.g. mortgage-interest deductions for owner-occupied dwellings). Moreover, the rule may especially impact frontier workers and have detrimental economic effects if such non-resident workers decide against employment in the Netherlands and prefer to work in another country. In such a scenario, employers in border regions should be concerned, given that the majority of non-resident workers are employed in areas along the Dutch border. In this inventory of the potential impact of the QFTO, we focus on the group of persons who are employed in the Netherlands, but reside outside of the Netherlands, as they are likely the largest group affected by the rule. The objective of this preliminary ex-post analysis is to examine trends over the years from 2013 to 2016 in the number of non-resident employees in order to see if notable changes occurred in the number and composition of non-resident employees in the Netherlands after the 90%-rule came into force.

Table 1 shows the number of non-resident workers in the Netherlands for the years 2013-2016, as well as the nationalities and countries of residence of the non-resident employees. The number of non-resident employees has increased considerably over this period. Where in 2013 the number of non-resident employees was a little more than 130.000, this number increased to over 185.000 in 2016. This increase, however, is mainly due to the large influx of Polish non-resident workers in this period. The number of non-resident workers living in Belgium or Germany increased just slightly. When we look at Dutch non-residents we see that they mostly live in Belgium or Germany, and that their number increased slightly since 2013.

Looking at employment sector, we see that most non-resident workers work in commercial services. These non-resident workers mainly have the Polish nationality. It is therefore not surprising that the number of non-residents employed in the commercial sector increased sharply since 2013 (from 85.800 in 2013 to 133.300 in 2016), corresponding with the large increase in the number of Polish non-residents over the same period. The number of non-residents working in the industrial sector or public and social services remains fairly constant around 20.000 for the years 2013-2016. Both these sectors mainly employ Dutch nationals, although they also employ a considerable number of Belgians and Germans. Few non-residents work in agriculture, forestry, and fishery and there are also no notable changes visible.

More than half of the non-resident employees work in the cross-border regions. Most of these non-resident workers live in either Belgium or Germany. This is also clearly depicted in Figure 1, which shows the number of non-resident workers residing in Belgium or Germany as a percentage of the total working population for the year 2016 (only this year is shown, because there is not much change over time). Unsurprisingly, most non-resident workers in cross-border regions at the German border are German, whereas those at the Belgian border are Belgian. Some border regions share a border with both Belgium and Germany (Midden-Limburg and Zuid-Limburg). In Midden-Limburg 3.6% of the working population in 2016 lived in either Belgium or Germany, while in Zuid-Limburg this was 5.6%. For most (border) regions the shares remained almost constant over the period 2013-2016, and no common trend is visible. The share of non-resident workers residing in Belgium or Germany over the total working population remains constant at 1% from 2013-2016.

Table 1: Number of non-resident employees by country of residence and nationality, 2013-2016 (x1000)

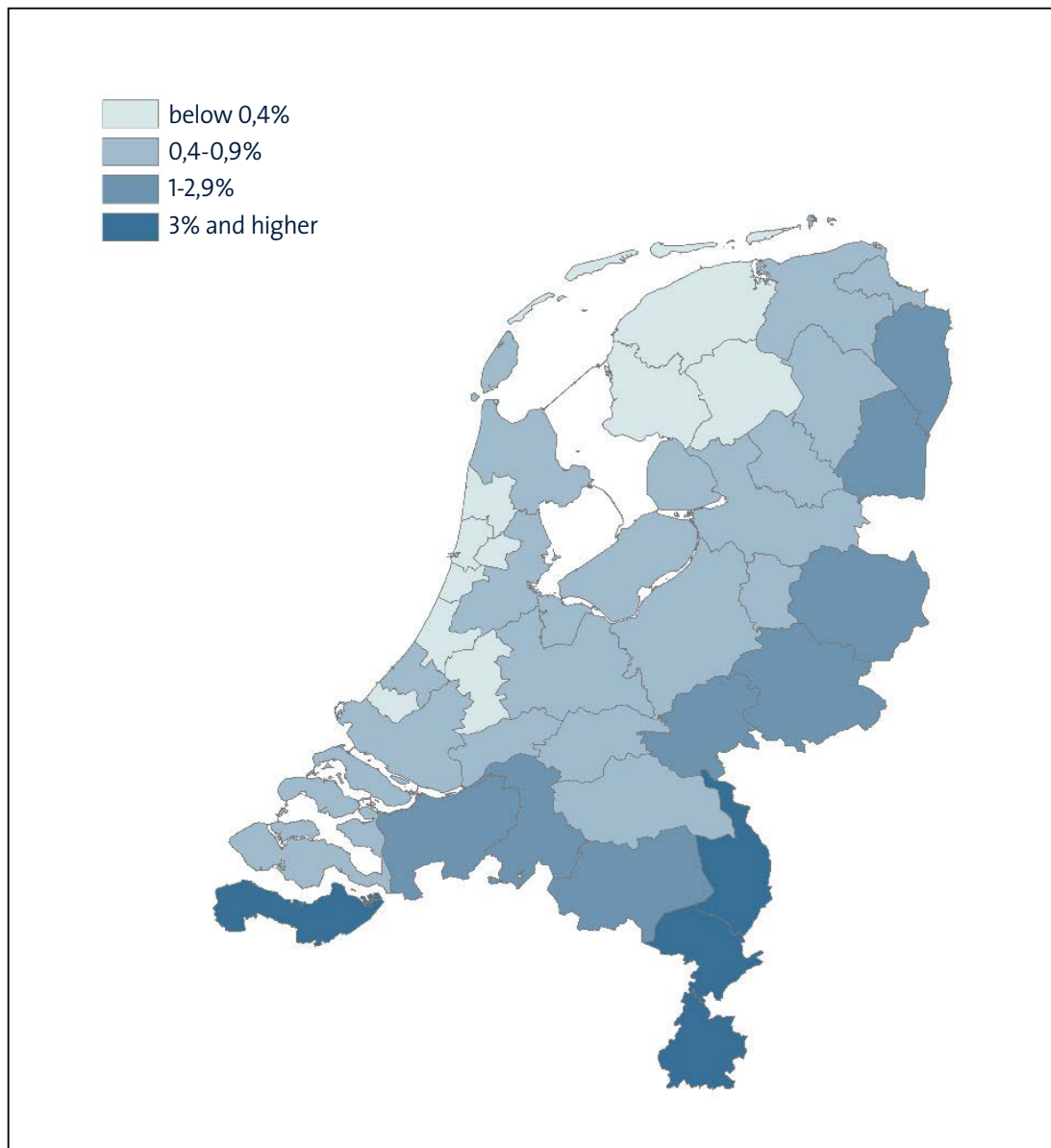
Country of residence			2013	2014	2015	2016
<b>Belgium</b>	Nationality	BE	13.9	14.1	14.2	14.7
		DE	0.2	0.2	0.2	0.2
		NL	20.9	21.1	21.0	21.1
		PL	0.3	0.3	0.3	0.4
		Other	1.2	1.4	1.4	1.5
	<b>Total</b>		<b>36.6</b>	<b>37.1</b>	<b>37.2</b>	<b>37.9</b>
<b>Germany</b>	Nationality	DE	15.4	14.2	14.3	13.9
		NL	15.8	16.1	16.3	16.4
		PL	2.7	2.8	4.1	4.6
		Other	1.8	1.9	2.0	2.8
	<b>Total</b>		<b>35.8</b>	<b>35.1</b>	<b>36.9</b>	<b>37.8</b>
<b>Poland</b>	Nationality	DE	0.9	0.9	0.9	0.8
		NL	0.9	0.9	1.1	1.2
		PL	42.8	53.9	71.5	77.2
		Other	0.5	0.6	0.4	0.4
	<b>Total</b>		<b>45.0</b>	<b>56.3</b>	<b>73.9</b>	<b>79.5</b>
<b>Other</b>	Nationality	NL	3.4	4.2	4.1	4.4
		PL	0.1	0.1	0.1	0.1
		Other	11.8	16.7	21.4	26.0
	<b>Total</b>		<b>15.4</b>	<b>21.2</b>	<b>25.9</b>	<b>30.8</b>
<b>Total</b>	Nationality	BE	14.1	14.2	14.4	14.9
		DE	16.6	15.5	15.5	15.1
		NL	41.0	42.4	42.6	43.1
		PL	45.8	57.0	76.0	82.3
		Other	15.3	20.5	25.2	30.7
	<b>Total</b>		<b>132.8</b>	<b>149.6</b>	<b>173.8</b>	<b>186.1</b>

Source: Statistics Netherlands

Overall, the preliminary ex-post analysis does not seem to show any compelling effects of the QFTO on the number and composition of non-resident workers in the Netherlands and the Dutch cross-border regions. When we look at the total number of non-resident workers we see an increasing trend, which is persistent over time and does not seem to have been altered since the implementation of the QFTO. For the nationality and work sector of non-residents we also observe a solid trend over the whole period 2013-2016; the number of Polish and “other” nationals increases, as well as the number of non-resident workers working in commercial services. For the border regions there are also no significant changes visible. However, this analysis does not allow us to focus on those individuals that are most likely affected by the QFTO (those who do not earn 90% of their world income in the Netherlands). Furthermore, the possible delayed effects of the rule cannot yet be assessed, as data is only available until 2016.

For future work, income data from the Dutch Tax Authority will become available, which makes it possible to assess which non-resident workers do not earn 90% of their world income in the Netherlands, and hence which non-resident workers are most likely to be affected by the QFTO. For future inquiries individuals can also be followed over time to research their exact labour and housing mobility. With the use of regression and/or time-series techniques it can be shown if the QFTO has a significant effect on the housing and labour mobility of non-resident employees.

Figure 1: Non-resident employees living in Belgium or Germany by all NUTS3/COROP regions, in percentages of the total working labour force for the year 2016



Note: For around 25%-30% of the workers it is not known in which COROP region they work. These percentages, however, are similar for both resident workers and non-resident workers. Therefore, the percentages will most likely approximate the real percentages, although they must be considered with caution.

Source: Statistics Netherlands

### 3.3 Schemes relating to retirement ages in NL/BE/DE: a multidisciplinary analysis

*Prof. dr. Anouk Bollen-Vandenboorn*

*Dr. Hannelore Niesten*

*Sander Kramer, LL.M.*

There is no standard European retirement age within the European Union. The different European Member States all have their own retirement ages for both statutory and supplementary pensions, and they differ considerably from one another. Because of this lack of coordination at the European level, a cross-border worker who has worked in different Member States is faced with different start dates and a wide range of options and impossibilities for making these start dates more flexible. The start date of the full pension of a cross-border worker – which is composed of a number of different pensions, each with its own start date – is determined by the highest retirement age. As a result, depending on their personal income situation, cross-border workers may face a shortfall in income in the period between leaving the labour market and the pension stage, which may jeopardize the adequacy of the pension as a provision for old age. An estimated 2000 former cross-border workers are affected by this. In addition, the existing flexible options are inadequate. The former legislative proposal for the flexibilization of the state old-age pension start date could have worked out positively as this would have offered the cross-border worker the option to synchronize the start of his or her state old-age pension in the Netherlands with the start date of the statutory pension abroad.

#### **Cross-border worker: a need for overview and insight**

In addition to this fragmentation of pension entitlements, cross-border workers are faced with a lack of an overview of and insight into their statutory and supplementary pensions, including the various retirement ages. This could mean cross-border workers are left in the dark as to the age at which they can start taking their pension. In addition, due to the lack of a comprehensive overview, cross-border workers are unable to determine whether they will receive a sufficient level of pension payments upon their retirement to maintain their standard of living after retirement. The person concerned also faces a high degree of uncertainty – including legal uncertainty – regarding the net pension income resulting from pension contributions in one Member State and tax payments in another. A cross-border or European pension register is therefore necessary in order to enable this cross-border worker to gain a clear and accurate overview of his or her accrued cross-border pension, to offer perspectives for action, and to guarantee an adequate income after retirement. Such a pension register is a positive incentive for the labour mobility of workers.

#### **People receiving two pensions: provision of more information as a first step**

One of the main consequences of the differences in retirement ages – and the main reason for a multidisciplinary analysis – is the discoordination of the tax and social security levy in the case of people receiving two pensions. In essence, the conflict rules in the bilateral tax treaties are not aligned with the conflict rules in Regulation (EC) 883/2004 and the authorization to tax is not always granted to just one Member State. This obligation to pay double contributions is particularly problematic in the European internal market. In some cases, the tax levy is charged in the state of residence and the social security levy in the state of retirement, or vice versa. In addition, pensioners may be contributing to financing care in more than one Member State. They are therefore put at a disadvantage in the form of double economic charges. The obligation to pay double contributions means that the equal treatment of current and retired cross-border workers is not guaranteed. In many cases, cross-border workers are not aware of the fact that they are switching between social security systems ('driving against the traffic'). This problem can be solved by means of information and advice provided by tax authorities and other organizations (such as the *GrensinforPunten* (border info points) and the *Grensoverschrijdend Werken en Ondernemen* team (cross-border work and business team) of the Tax and Customs Administration in Maastricht).

#### **Pensions: coherence of tax and social security charges**

One possible way of improving coherence in taxation and social security levies relating to pensions is to abolish the special provisions for pensioners in the Regulation along with the exclusive application of the main rule on taxation of pensions (Art. 18 of the OECD model tax convention) and to assign the obligation to insure to the state of residence (Art. 11, section 3, part e of the Regulation (EC) No 883/2004). Both tax and social security contributions would then be subject to taxation in the state of residence, which would lead to 'equality in the street' as guaranteed under the Treaty on the Functioning of the European Union (TFEU). In this case, the arguments for and against the taxation in the state of residence are weighed up. A less far-reaching solution could also be considered for an adjustment and improvement of the current regime. One suggestion could be to use the

duration of insurance as a starting point when designating the competent pension state. In addition, cross-border workers could opt for a tailor-made solution, such as accepting a fragmented pension and/or a small employment position. However, if a Dutch or Belgian pensioner takes on a part-time job across the border, this would have an impact on his or her social security position. A single-pension pensioner can switch their social security position by working in their country of residence. This may affect rules relating to matters such as health insurance, which may bring advantages or disadvantages.

### **Pro rata right to levy tax between the state of residence and the source state**

One alternative is a proportional (pro rata) right to levy tax, divided between the state of residence and the source state. However, this is not a solution if it is not linked to the exclusive levying of social security contributions. On the other hand, from a Dutch perspective this does not seem to be a very realistic option in view of the international efforts made during treaty negotiations to impose taxation in the source state on tax-facilitated pensions. In addition, a non-affiliated agreement could be reached on the grounds of Article 17 of Regulation (EEC) No 1408/71 or Article 16 of Regulation (EC) No 883/2004 in which the social security levy is linked to the tax levy. In theory at least, there is also the possibility of limiting the power of the pension state to collect contributions or limiting the taxation powers of the state of residence. In addition, the right of the country of residence to levy tax could be restricted. Although this option would contribute to the equal treatment of cross-border workers, some questions could be raised regarding the technical implementation aspects and the administrative burden for the implementing bodies.

### **Care financing by pensioners: discount scheme**

In addition, health care in some Member States is financed either by general resources (tax), by tax and social security charges, or by a combination of means. Pensioners may therefore contribute to the financing of care in more than one Member State, resulting in economic double taxation which is at odds with the freedom of movement. This problem can be solved unilaterally, for example by means of a discount on the tax assessment (equivalent to the proportion of the tax used by the state of residence to finance health care) as permitted by a state of residence.

### **Disparities in retirement ages: impact on application of national legislation**

The lack of harmonization of retirement ages between Member States also affects national legislation, for example with regard to insurance periods in other Member States. For example, if an employee can take their statutory pension in the Netherlands or Germany, this is not automatically also the case in Belgium. If the employee opts to take his Dutch pension and stops working, this may result in the option of retiring in Belgium being postponed. In addition, the differences in retirement ages lead to a lack of income continuity for cross-border workers residing in Belgium who have had a long period of employment in the Netherlands and become unemployed after the age of 65.

### **New legislation: cross-border impact to be assessed preventively**

The above makes it clear that it is necessary to take account of the effects of new legislation on cross-border workers and border regions in the process of preparing legislation and regulations because this will prevent existing legislation from having to be adjusted and corrected at a later stage. In addition to making savings in terms of administrative tasks and time, this also prevents inconvenience being caused to the people affected. New legislation and regulations concerning cross-border workers and border regions still do not generally receive the attention they deserve; in other words, national legislators still underestimate the cross-border impact. We support the need for preventative research into the cross-border impact at an early stage of the legislative process, and the incorporation of the findings into the *Intergraal Afwegingskader* - IAK (the integrated impact assessment framework for policy and legislation). A preventative cross-border impact assessment should form part of new Dutch and European legislation and should be multidisciplinary in its nature. This assessment could be made even more concrete if statistical offices were able to use coherently-collected data on cross-border employment and pensions. This will make it possible to identify more specifically the scale of the current problems and their impact on the sustainable economic development of the border regions and the business climate.



### 3.4 Baukindergeld

Dr. Hannelore Niesten

Within the framework of the *Wohnraumoffensive* (the Merkel government's national building scheme), the *Koalitionsvertrag*<sup>6</sup> (Coalition Agreement of the German Federal Government) between the political parties CDU, CSU, and SPD includes an agreement to a form of child benefit aimed at promoting home ownership among young families. The *Baukindergeld* is a child-dependent benefit that can be made available over a period of ten years to assist with the purchase of an existing dwelling or a dwelling that has yet to be built in Germany. The benefit amounts to €1,200 per child per year (up to 25 years of age).<sup>7</sup> The condition for receipt of the benefit is that the annual taxable family income does not exceed €75,000, with €15,000 added to the limit per child. The income limit is calculated by taking the average of the annual income of the past two calendar years. So far, there is no legal basis for the benefit.<sup>8</sup> The law is expected to be passed in the autumn of 2018. The scheme would apply retroactively from 1 January 2018.<sup>9</sup> The *Baukindergeld* is only for people who live in Germany. It is therefore necessary to examine whether the *Baukindergeld* constitutes a restriction on free movement and freedom of establishment laid down in Articles 21, 45, and 49 of the Treaty on the Functioning of the European Union (TFEU).

#### Residence requirement of the benefit is not EU-proof

The proposed scheme as it stands today means that cross-border workers do not meet the conditions of eligibility for the *Baukindergeld*, as it requires the person concerned to be resident in Germany. Making the *Baukindergeld* conditional on the dwelling being located on German territory is contrary to EU law (see in this context the condemnation pursuant to European law of the *Eigenheimzulage* [grant for building owner-occupied property], below).

The requirement for the home to be located in Germany would mean that resident tax payers under German law (*unbeschränkte Steuerpflicht*) (including non-residents with more than 90% German-source income) who are owners of their home which is located outside Germany would not be eligible for the *Baukindergeld* in Germany. There is often also no right in the country of residence to tax benefits that encourage home ownership. In most cases, incomes in the country of residence are too low to be able to benefit from mortgage interest relief. These people therefore fall between two stools.<sup>10</sup>

Under the proposed scheme, cross-border workers are not eligible for the benefit, even though persons who are in the same situation from an income-tax perspective and who live or intend to live on German territory by building or acquiring a dwelling are eligible for the benefit. In such a situation, the benefit therefore has a dissuasive effect on cross-border workers working in Germany, who enjoy the right to free movement pursuant to Articles 45 and 49 of the TFEU and who wish to build or acquire a dwelling in another Member State in order to take up residence there. It follows that making the *Baukindergeld* benefit conditional on the dwelling that is being built or acquired for the purpose of living in it being situated on German territory infringes the freedom of movement of workers and the freedom of establishment, as guaranteed by Articles 45 and 49 of the TFEU.<sup>11</sup>

#### Designation of the benefit: social or tax advantage

Pursuant to Article 7(2) of Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union<sup>12</sup>, migrant workers enjoy the same 'tax and social advantages' as workers with the nationality of the host Member State. Cross-border workers are entitled to equal treatment in terms of fiscal and social advantages.

6 Can be viewed (in German) at: [https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag\\_2018.pdf?file=1](https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1).

7 In 2018, €263 million is budgeted for construction costs. The sum of €3 billion will be set aside for the coming financial years. See (in German): <https://www.vergleich.de/baukindergeld.html>.

8 <http://www.aktion-pro-eigenheim.de/haus/news/baukindergeld-2018-ein-update-zur-baufoerderung-fuer-familien.php>.

9 <http://www.faz.net/aktuell/wirtschaft/kompromiss-beim-baukindergeld-flaechenbegrenzung-aufgehoben-15661576.html>.

10 As far as the Netherlands is concerned, the taxpayer can transfer a surplus of foreign 'box 1' income (taxable income from employment and homeownership) to a subsequent year (the so-called *doorschuifregeling* or "storage scheme" (*stallingsregeling*)). See article 11 'Double Taxation (Avoidance) Decree 2001'.

11 Compare with ECJ, 26 October 2006, C-345/05, *Commission/Portugal*, Jur. 2006, I-10633, point 25.

12 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, *OJ* L 141/1.

Whether the *Baukindergeld* is to be regarded as a ‘fiscal’ benefit or as a ‘social’ benefit is therefore ultimately not important. The German method of directly promoting the purchase of an existing dwelling or one yet to be built can be regarded as an acute negative tax in terms of its function: a grant. On the one hand, it can be argued from the name ‘*Baukindergeld*’ that this benefit is taken care of via the *Einkommensteuergesetz* (Income Tax Act) (as is the standard *Kindergeld* [child benefit]). The *Baukindergeld* benefit is not specifically granted to workers but to everyone. The *Baukindergeld* benefit is a general incentive scheme for home ownership. On the other hand, the German *Baukindergeld* benefit may also be designated as a so-called social benefit.<sup>13</sup> The *Baukindergeld* benefit should also be granted in cases in which the cross-border worker and/or his or her spouse are fully exempt from tax in Germany. After all, the notion of ‘social benefit’ also offers advantages that are granted simply because the beneficiary is resident in the national territory. Cross-border workers are, as a rule, in the same position as workers established in their own national territory. The German scheme, under which cross-border workers are excluded from the benefit, therefore creates a disguised form of discrimination and is therefore contrary to the free movement of persons and Article 7(2) of Regulation (EU) No 492/2011. After all, cross-border workers are entitled to the same fiscal and social advantages as their German counterparts. Equal treatment in the workplace applies to Belgian, Dutch, Luxembourg, Polish, French, Swiss, and Czech cross-border workers in Germany.

However, there is no entitlement to *Baukindergeld* under Regulation (EC) No 883/2004. Unlike the German *Familienleistungen* (Family benefits, e.g. *Kindergeld* [child benefit])<sup>14</sup>, the German *Baukindergeld* cannot be designated as a social security benefit within the meaning of the European Regulation (EC) No 883/2004 on the coordination of social security systems.

### **Eligibility of cross-border workers to receive *Baukindergeld* in Germany pursuant to EU law**

The *Baukindergeld* can be regarded as an advantage in terms of personal and family life, as referred to in the judgment of the European Court of Justice in the *Schumacker* case. In most cases, cross-border workers working in Germany find themselves in a ‘Schumacker situation’.<sup>15</sup> In most cases, resident tax payers under German tax law who live outside Germany earn almost their entire income or family income in Germany (90%) and should therefore be treated in the same way as German residents as regards personal and family benefits. Refusing to grant financial assistance to persons resident outside Germany but who under German tax law are deemed a resident tax payer constitutes indirect discrimination and is contrary to EU law.<sup>16</sup> After all, under EU law, migrant cross-border workers are entitled to the same treatment as comparable workers (i.e. in the ‘Schumacker situation’) who are nationals of the country in question. Consequently, Germany must also grant the *Baukindergeld* for owner-occupied dwellings situated outside German territory if the cross-border worker working in Germany has income of which more than 90% is subject to German taxation (and is therefore a resident tax payer under German tax law). On the other hand, it also follows from EU law that whether or not the country of residence can take into account the personal and family circumstances of the tax payer is an important factor.<sup>17</sup> If the country of residence is unable to do so due to the person in question having an insufficient taxable income, while Germany as the country of employment can take this into account because the person concerned receives sufficient income there, Germany will have to grant the benefit even if the 90% income limit has not been met.

13 See article expressing the views of G. Essers, ‘Heeft een grensarbeider aanspraak op het Duitse Baukindergeld? Ja!’ (in Dutch), available at <https://aha24x7.com/heeft-een-grensarbeider-aanspraak-op-het-duitse-baukindergeld/>.

14 Pursuant to the European Regulation (EC) No 883/2004 on the coordination of social security systems, a cross-border worker is entitled to the German *Familienleistungen* (Family benefits, e.g. *Kindergeld* [child benefit]). If one parent works in the Netherlands and the other parent works in Germany, the Dutch child benefit ranks first for payment. Germany must then supplement (‘*aufstocken*’) the Dutch child benefit to the applicable German level. Equal treatment in the country of residence and equal treatment in the country of employment.

15 Amongst others ECJ, 14 February 1995, C-279/93, *Schumacker*, *Jur.* 1995, I-225. See also H. Niesten, *Belastingvoordelen van de grensoverschrijdende EU-persoon. Een onderzoek naar de behoefte aan en de mogelijkheden van het minimaliseren van fiscale belemmeringen van het vrije personenverkeer in de Europese interne markt*, PhD thesis Hasselt and Maastricht, 2017.

16 Amongst others the free movement of workers in Articles 18 and 45 of the TFEU; freedom of establishment in Article 49 of the TFEU for self-employed persons.

17 See ECJ 9 February 2017, C-283/15, X, ECLI:EU:C:2017:102, point 42.

Moreover, even in non-Schumacker situations, cross-border workers working in Germany are entitled to German *Baukindergeld* pursuant to Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union.<sup>18</sup> As stated above, pursuant to Article 7(2) of Regulation (EU) No 492/2011 migrant workers enjoy the same ‘tax and social advantages’ as workers with the nationality of the host Member State. As the *Baukindergeld* is to be considered as a benefit within the meaning of article 7(2) of Regulation (EU) No 492/2011, cross-border workers employed in Germany are entitled to it.

### Lessons from previous European rulings on the former German ‘Eigenheimzulage’

The *Baukindergeld* is the successor to the former *Eigenheimzulage* (grant for building owner-occupied property) in Germany.<sup>19</sup> The *Eigenheimzulage* was a large-scale building grant for families between the years 1995 and 2005. This benefit was granted to families (with children) who wanted to acquire property. Approximately €800 per child was granted per year. This German tax-free grant scheme for the promotion of home ownership was abolished in 2005.<sup>20</sup> People who were resident tax payers in Germany under German tax law and who had acquired a dwelling in Germany were eligible to claim the *Eigenheimzulage*.<sup>21</sup> However, Germany refused to pay the *Eigenheimzulage* to cross-border workers working in Germany. The *Eigenheimzulage* was abolished after the European Commission was asked by the European Parliament in 2003 whether Germany’s refusal to pay the *Eigenheimzulage* to cross-border workers was in breach of EU law.<sup>22</sup> The then European Commissioner Frits Bolkestein was of the opinion that a ‘cross-border worker who was a resident tax payer in Germany under German tax law’ could claim the German *Eigenheimzulage*.<sup>23</sup> Following infringement proceedings by the European Commission, the Court of Justice ruled against the German government in 2008.<sup>24</sup> Cross-border workers who had applied for the *Eigenheimzulage* received the payment after all with retroactive effect.

### Possible solutions

It is clear from the above that the *Baukindergeld* cannot be limited to homeowners in Germany. Cross-border workers living outside Germany and working in Germany are also entitled to it. The rules on the free movement of persons and on European citizenship do not allow any distinction to be made between places of residence in this respect.<sup>25</sup> It is recommended that a coherent analysis of the impact of the new legislation on cross-border workers be included in the parliamentary debate on new legislation, which could be included in a separate section of the Explanatory Memorandum. However, in so far as analyses of the cross-border impact of new legislation have taken place, such analyses are often not carried out in a coherent manner, i.e. the method of investigation varies. In general, the cross-border impact of new legislation on cross-border workers and border regions is still not being adequately examined, i.e. the cross-border effect is still underestimated by national legislators.<sup>26</sup>

18 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ. L 141/1.

19 The *Eigenheimzulage* was set out in the first sentence of Paragraph 2(1) of the Law on subsidies for owner-occupied dwellings (*Eigenheimzulagengesetz*) in the version published in 1997, as amended by the Accompanying Budget Act of 2004 (*Haushaltsbegleitgesetz 2004*).

20 The law abolishing the grant for building owner-occupied property (*Gesetz zur Abschaffung der Eigenheimzulage*) of 22 December 2005, BGBl. 2005 I, p. 76.

21 paragraph 1 of the *Einkommensteuergesetz* (Income Tax Act), in the version of the BGBl (Federal Law Gazette). 2002 I, page 4210 (hereinafter: ‘EStG’).

22 Written question E-3846/02 by Ieke van den Burg (PSE) and Wilfried Kuckelkorn (PSE) to the Commission. See (in Dutch): J. Feijen, ‘Bolkestein: Duitsland moet Eigenheimzulage verlenen aan grensarbeiders’, NTFR 2003, edition 16, p. 679.

23 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A92002E003846>.

24 ECJ 17 January 2008, C-152/05, *Commission v Germany*, Jur. 2008, I-39, V-N 2008/10.6.

25 ECJ 17 January 2008, C-152/05, *Commission v Germany*, Jur. 2008, I-39.

26 On the positive side, however, two studies on the position of cross-border workers were published in 2017:

- Report by the Commissie grenswerkers (Committee for cross-border workers), *Grenswerkers in Europa; Een onderzoek naar fiscale, sociaalverzekerings- en pensioenaspecten van grensoverschrijdend werken* (Geschriften van de Vereniging voor Belastingwetenschap no. 257), Vereniging voor Belastingwetenschap (Association for taxation studies) 2017.
- H. Niesten, *Belastingvoordelen van de grensoverschrijdende economisch actieve EU-persoon* (PhD thesis Maastricht and Hasselt), 2017.

### 3.5 Social security of non-standard workers: a challenge at the national and European level

Dr. Saskia Montebovi

*'Offering access to social protection is crucial for the economic and social safety of the workforce and well-functioning labour markets that create jobs and sustainable growth. Nevertheless, there is a growing number of people who, due to their type of employment relationship or form of self-employment, are left without sufficient access to social protection.'*<sup>27</sup>

Now that increasing numbers of workers, both in the Netherlands and in other Member States, can no longer be regarded as standard workers, it is useful to investigate the social security protection of this growing group of non-standard workers.<sup>28</sup> Who are they? What protection do they have, what protection do they lack, and what happens in a cross-border work situation?

One can no longer ignore the increase in new forms of work and contracts including on-demand work, part-time work, intermittent work, voucher-based work, platform work, and work as a self-employed person (including pseudo self-employment).<sup>29</sup> The evolution towards this type of working relationship over the last twenty years will – in the long run – affect and threaten the social, economic, and financial sustainability of our social security systems.<sup>30</sup> But even now, the workers, their employers, and governments are reaching the limits of the current systems. As defining the employment relationship can be so complex, the social-security position of the non-standard worker is often already up for discussion. On the basis of current legislation as well as the lack thereof, platform workers who offer and carry out their services via Uber, Deliveroo, Helpling, Werkspot, Foodora, etc. are generally classed as self-employed. This has a direct impact on their social-security protection, as this is much more limited for the self-employed compared with employees. It has also become apparent that workers with high levels of labour mobility often have insufficient social security rights and entitlements, precisely because of their changing work pattern, sometimes performed in multiple countries.

In addition to freedom and economic gain, this lack of a comprehensive and transparent legal framework for platform workers and workers with high levels of labour mobility leads to abuses, legal uncertainty, legal inequality, insufficient legal protection, etc.<sup>31</sup> In the Netherlands, Wouter Koolmees, the Minister of Social Affairs and Employment, has promised to propose a solution by 2020. Furthermore, initiatives are being implemented at a European level, though they are non-binding.<sup>32</sup>

In the absence of new legislation and sufficient jurisprudence, we will have to define and regulate the *new* employment relationships with the *existing* rules. The main bottlenecks are: firstly, the limited hours or income from non-standard working relationships and the associated limited social security contributions and accrual; secondly, the diffuse separation between employees and the self-employed, which also increases pseudo self-employment; thirdly, the digital revolution, which is drastically changing the nature of work and working

27 European Commission: Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, page 1.

28 For the description and definition of the non-standard worker as well as the standard working relationship, please refer to the Cross-border Impact Assessment on which this summary is based.

29 European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, page 2.

30 For more information, please refer to the European Commission Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, pages 1 and 2. Please also refer to page 4 of the same document for percentages relating to the different types of employment relationships.

31 Examples include the situation of workers at Deliveroo, Uber, Helpling, etc.

32 For examples at the Dutch national level, please refer to documents such as the coalition agreement dated 10 October 2017, pages 22-26 (only available in Dutch). For EU-level examples, please refer to documents including European Pillar of Social Rights, A European agenda for the collaborative economy, 2018 Commission work programme, White Paper on the Future of Europe, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, and Proposal for a Directive on transparent and predictable working conditions in the European Union.

relationships; and fourthly, the European rules contained in the Regulations on the coordination of social security systems (EC Regulations 883/2004 and 987/2009). These European rules are still based on physical presence at a workplace. This is inflexible regarding workers in new forms of employment such as teleworking as well as hybrid workers – those who sometimes function as employees, self-employed individuals, or civil servants and sometimes combine several statutes and jobs – and with regard to temporary contractors who, whether voluntarily or not, enter into alternating short-term, temporary working relationships and who, in the meantime, sometimes find themselves in a legal vacuum. Moreover, those who work alternately in their country of residence and the country of employment are bound by the coordination rules specified in European regulations written during the period when workers had one job with one employer for a sustained period of time.

The Cross-border Impact Assessment further analyses European integration, sustainable development, and Euregional cohesion regarding non-standard workers such as teleworkers, homeworkers, and workers who have multiple short-term employment relationships, whether they are chosen deliberately and voluntarily or not.<sup>33</sup>

The themes of European integration and Euregional cohesion refer to the current complex or overly complex work and employment relations that cannot be addressed by the current coordination regulations. As the current designation rules of the Regulations still apply the country of employment principle as the main rule, while relying on the physical presence of the worker, teleworking or a combination of several jobs in several countries is difficult to classify and leads to undesirable and impractical changes to the applicable legislation. For example, one week a teleworker would be covered by social insurance in the Netherlands as that is where most of their working hours are spent, whereas during another week German social security legislation should apply because the teleworker works more hours at their home in Germany.<sup>34</sup> This is unattractive for both workers and employers. As such, employers are not encouraged to make use of the free movement of persons. Moreover, the issue of equal treatment also plays a role, as employers who wish to treat all their employees equally and place them all under the Dutch social security provisions and labour law rules must take the 25% rule of the regulation into account. As a result, workers who work from home for one out of three or two out of five days will no longer be covered by social insurance under the legislation of the 'main workplace' or where the employer is established but will be insured under the social security legislation of their place of residence. This means that equal treatment in legislation and regulations, as employers also often pursue, is now practically impossible despite the fact that the working conditions at home and at the employer are almost identical via teleworking.

In short, the increase in non-standard working relationships and the gig economy definitely do not contribute to the legal certainty or clarity of non-standard workers. Moreover, it often does not contribute to a decent legal position for non-standard workers, most certainly not in cross-border working relationships. Both the current national legislation and the European regulations need to be refined or adapted, which would be beneficial to workers, employers, and governments.

33 Please refer to the Social Security dossier from paragraph 2.3.2 onwards of the ITEM Cross-border Impact Assessment 2018.

34 This is a simplified view since multiple factors play a role over a longer period of time. For more information, please refer to EC Regulations 883/2004 (Articles 11 and 13) and 987/2009 (Articles 6, 14, and 16).

### 3.6 Student dossier: The potential effects of the ‘Experiment gesloten cannabisketen’ on the Euregions Meuse-Rhine and Rhine-Meuse-North

Saskia Marks

Gaia Lisi

Floor van der Meulen

Calumn Hamilton

Castor Comploj

On October 10 2017, an unprecedented Pilot Project with the name “Experiment gesloten cannabisketen” was presented in the Netherlands. The coalition agreement introduces the Pilot Project to address the current backdoor-problem. It comes with the scope of studying the effects of a potential legalization of the production of cannabis in particular on the reduction of crime and on decreases in adverse health effects from consuming low-quality marijuana. The Pilot Project consists of an experiment in which the cultivation of cannabis will be decriminalised within strict parameters and a finite, prespecified timeframe. This will take place in 6-10 municipalities in the Netherlands in a time-span of 4 years. The precise wording of the coalition agreement, in English, is as follows:

*“The government will introduce legislation, if possible within six months, on uniform experiments with tolerated cultivation of cannabis plants for recreational use. The experiments will be carried out in six to ten large and medium-sized municipalities, with the aim of determining whether and how controlled cannabis can be legally supplied to coffee shops and what the effects of this would be. After these experiments have been independently evaluated, the government will consider what action to take.”*

This study provides an ex-ante impact assessment of this Pilot Project on two Euregions. The geographical focus of the demarcated Euregions is formally known as Meuse-Rhine and Rhine-Meuse-North. The main findings can be categorized under three different themes, which are respectively European Integration, Sustainable/ Socio-economic development and Euregional Cohesion.

With regard to the theme of European Integration, it can be put forward that the Pilot Project will not further the goals of free movement under European Union law. The fact that specific municipalities will be selected into the Pilot Project could be regarded as a form of indirect discrimination among individuals providing services, as protected by European Law under Articles 49 and 56 TFEU. However, because there appears to be valid reason for the violation of EU law (i.e. reducing organized crime and improve the quality sold in coffeeshops), the new legislation could be justified upon the rule of reason. The cultivated cannabis cannot be exported freely and the selection of cultivators could therefore potentially infringe on the freedom of establishment and the freedom to provide services.

The analysis of potential impacts such a policy could have on a Euregional macroeconomic level is crucial to the scope of this impact assessment. While decriminalizing the production of cannabis itself could already at the national level have a strong impact on employment trends and tax revenue, the effect could be further amplified in the Euregion Meuse-Rhine and Rhine-Meuse-North due to its proximity to the neighbouring countries Germany and Belgium. In the Euregion in particular, a decrease in drug tourism and nuisance deriving from these countries’ nationals is being aimed at by participating in the pilot project. Although drug nuisance in the city of Maastricht has been decreasing over time from 58 to 39 percent, it still remains relatively high in the Netherlands.

At the level of Socio-Economic development, the new legislation is likely to be beneficial. In 2015 alone, almost 6000 illegal cannabis plantations have been seized all across the Netherlands which according to the Dutch police was estimated to be only one fifth of the total. Since 6.55 percent of the population in the Netherlands live in the Euregion, this would imply that almost 2000 cultivators are operating in the Meuse-Rhine and Rhine-Meuse-North Euregions, assuming that the level of illegal cannabis cultivation and associated revenues in the Netherlands is independent of the geographic location. This, together with a CBS estimate of €450m for illegally produced marijuana in the Netherlands, or proportionally €29.5m in the Euregion, would imply that an upper bound estimate of €100m per annum is set for potential tax revenues from the decriminalisation of marijuana production in the Netherlands, proportionally €6.55m in the Euregion. Additionally, were the cultivation of cannabis to become tolerated under Dutch law, this would make a yearly contribution of €6000-8000 for every

worker active in the cannabis production industry, provided that these currently produce a value added which is close to average in the Dutch economy.

With regard to the theme of Euregional cohesion it was established that in the jurisdictions concerned (the Netherlands, Germany and Belgium) the cultivation, trade, sales and consumption of cannabis are illegal, although all of these jurisdictions tolerate the possession and cultivation of cannabis in small amounts. The discrepancies between the different legal frameworks will now only become larger due to the Pilot Project. In addition, the Pilot Project tests the limits of obligations under the international legal framework by enabling the cultivation of cannabis on a larger scale. However, the potential incompatibility with international obligations is mitigated by the experimental and temporary character of the experiment. Finally, the paper identified an increased likelihood that Belgium and Germany step up border controls to combat illegal cultivation and trade of cannabis.

It is therefore clear that, although it forms only a national cannabis policy, the Pilot Project has the potential to impact the Meuse-Rhine and Rhine-Meuse-North Euregions both in terms of European Integration, Sustainable/ socio-economic development, and Euregional Cohesion.

## **Annex - The ITEM Cross-border Impact Assessment as a Basis for Action: Looking Back at the Follow-up Activities of the 2016 and 2017 ITEM Cross-border Impact Assessments**

One of ITEM's core tasks is to carry out yearly cross-border impact assessments. With these assessments, ITEM strives to give insight into the effects of new legislation and policy on border regions and how existing law and policy affect border regions. Since its inception in 2015 ITEM has successfully concluded three such impact assessments, the latest of which you are now reading. The successful completion of these Cross-border Impact Assessments is for the most part due to the efforts of the Maastricht University researchers involved resulting in valuable research on the effects of legislation and policy on border regions.

However, the impact and success of the ITEM Cross-border Impact Assessments is not exclusively limited to providing a useful contribution to the scientific debate surrounding border regions. ITEM's impact assessment targets policy makers at the regional, national and European level who make decisions concerning border regions. The Cross-border Impact Assessment contributes to the political debate by supporting the identification of existing or future border effects. In this context, the 2016 and 2017 reports have proven to be able to provide a solid basis for further action and research aimed at improving cross-border mobility.

For example, the 2016 ITEM Cross-border Impact Assessment Dossier on Social Security led to the organisation of an Employer Symposium in cooperation with the Holland Expat Centre South, Grensinfopunt Maastricht and City Deal Eurolab. The same dossier also resulted in an expert workshop on the Commission's proposal amending Regulations 883/2004 and 987/2009 in Brussels. At the same time, Dossier 2 of the impact assessment led ITEM to initiate a feasibility study for a cross-border professional recognition card.

The 2017 assessment has proven to be able to form an even broader basis for action. Again, the Dossier on Social Security led to follow-up actions. ITEM provided input to the European Parliament rapporteur on the Posted Worker's Directive. The Dossier on the German car toll for passenger cars was picked up by the media and led to a radio interview with Dutch radio program *'BNR Spitsuur'*. Moreover, the dossier was also mentioned in the impact assessment conducted by Ecorys that was commissioned by the Dutch Ministry of Infrastructure and Water Management. The legal analysis included in the ITEM Cross-border Impact Assessment Dossier on the German car toll partly contributed to the decision of the Netherlands to join Austria in a claim against Germany before the Court of Justice of the European Union.

Nevertheless, not only the dossiers of the ITEM Cross-border Impact Assessments have been cause for follow-up actions, the methodology employed in the impact assessment also gained publicity. For example, the methodology employed by ITEM and its researchers was labelled as a best practice by the European Commission's Directorate-General for Regional and Urban Policy (DG Regio) in its communication *Boosting growth and cohesion in EU border regions (september 2017)*. The recognition gained by ITEM led to further cooperation between the Expertise Centre and the European Commission. In particular, ITEM is cooperating with DG Regio on the development of a European cross-border impact assessment methodology.

Furthermore, the methodology employed in the ITEM Cross-border Impact Assessment as well as the findings emanating from its individual dossiers were presented at several events throughout 2017. Presentations were provided, among others, at the conference of the European Council of Spatial Planners in Budapest, at a meeting of the Dutch GROS Network, at a gathering of Euregion directors, at the launch of the European Commission's boosting growth initiative, at a conference organised by the Euroinstitut, at a meeting for representatives of the Belgian Province of Limburg, at a meeting with the German Ministry of foreign affairs, and at meetings with members of the Dutch Senate and the Provincial Council of Limburg (NL).

Apart from presentations on the ITEM Cross-border Impact Assessment methodology and content, ITEM also promotes the exercise of impact assessments in general. Being an avid supporter of regular, border-specific, bottom-up impact assessments, ITEM has voiced its support and expressed the need for more cross-border impact assessments to be carried out in the Netherlands at several Dutch Ministries.



Finally, ITEM is increasingly devoting attention to the ex-ante identification of border effects of proposed legislation and policy. In order to determine whether a rule or measure has a certain effect on border regions, ITEM has introduced a quick scan. This initiative employs its own methodology and may be applied to estimate to what extent a certain topic will require further assessment as far as border effects are concerned. In 2017, two quick scans were conducted by ITEM. Whereas one of these quick scans focused on examining the Dutch Coalition Agreement, the other explored the border effects of the increase of the low VAT tariff in the Netherlands. As this year's Cross-border Impact Assessment shows, two themes from these quick scans (i.e. the increase in the low VAT tariff and the experiment concerning legal cannabis cultivation) were indeed taken up in dossiers.

Looking to the future, ITEM is dedicated to continue to map the effects of international, European, national and regional legislation and policy in its Cross-border Impact Assessments. The Expertise Centre furthermore intends to develop its impact assessment and quick scan methodologies further and is looking forward to doing so in cooperation with its partners, stakeholders and researchers.

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